MBf FACTORS SDN BHD

v.

BAN HOO ELECTRICAL AND FURNITURE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-12-404-1998]
25 OCTOBER 1999

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Time limit for filing and service - When does time start to run - Whether upon service of unsealed copy of notice of application or upon service of sealed copy of notice of application - Subordinate Court Rules 1980, O. 24 r. 4(2)(b) - Rules of the High Court 1980, O. 32 r. 13(2)(b)*

The instant appeal turned upon the proper construction of O. 24 r. 4(2)(b) of the Subordinate Court Rules 1980 (similar to O. 32 r. 13(2)(b) of the Rules of the High Court 1980). The issue was whether the 14-day period for filing an affidavit in reply starts to run from the date of service of the unsealed copy of the application and the supporting affidavit intended to be replied to, or whether it starts to run from the date of service of the sealed copy of the application and the supporting affidavit intended to be replied to.

Held:

[1] The language of O. 24 r. 4(2)(b) of the Subordinate Court Rules 1980 clearly indicates that time starts to run from the date of the service of the affidavit, even when the application which the affidavit is intended to support is unsealed but only filed in court.

[Appeal dismissed with costs.]

Case(s) referred to:
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(not foll)***
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 13(2)
Subordinate Court Rules, O. 24 rr. 1(1), 4(2)(b), O. 26A r. 3(1)

For the appellant - Kingston Tan (HQ Kwong with him); M/s Heiley Hassan Tan & Partners
For the respondent - KC Ang; M/s CP Ang & Co

Reported by S Dharmendran

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JUDGMENT

KC Vohrah J:

The appellant (the plaintiff) filed an affidavit in reply to the affidavit supporting an application by the respondent (the defendant) to transfer the b summon case filed by the plaintiff from the Kuala Lumpur Sessions Court to the Alor Setar Session Court.

The unsealed, unsigned and undated copy of the notice of application and the supporting affidavit, which had been filed in the Sessions Court, were served on the plaintiff on 11 June 1998. c

33 days after this date of service, on 14 July 1998, the affidavit in reply of the plaintiff was served on the defendant. A preliminary objection was taken by the defendant in the Sessions Court, relying on O. 24 r. 4(2)(b) of the Subordinate Court Rules (the SCR), to the admissibility of this affidavit in d reply on the ground that it was filed out of time. The plaintiff, however, argued that the affidavit in reply was actually filed on time as it was filed 13 days after the sealed copy of the application and the supporting affidavit had been served on the plaintiff, well within the period of 14 days that was allowed. The judge of the Sessions Court rejected the argument of the plaintiff and e allowed the objection of the defendant. Thus this appeal.

I think the language of O. 24 r. 4(2)(b) of the SCR is clear – that time starts to run from the date of the service of the affidavit, even when the application which the affidavit to be used in support is unsealed but only filed in court, on the plaintiff. Case law, the Court of Appeal case of *Structural Concrete* f *Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300 (the *Structural Concrete* case) relating to the equipollent provision, O. 32 r. 13(2) of the Rules of the High Court 1980 (the RHC), establishes that time runs not from the date of service of the summons in chambers which has been sealed but from the date of service of the summons in chambers which has been filed.

g The application in the instant case, although heard in open court, was a application which should have been heard in chambers (see O. 24 r. 1(1) of the SCR), unlike an application for summary judgment under O. 26A which must be heard in open court (see O. 26A r. 3(1)). And O. 24 r. 4(2) applies to an application in chambers. h

There is a later Court of Appeal case *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 AMR 2869 (the *PNISB* case) which states that time for the party who wishes to make an affidavit in reply starts to run after the service of the sealed copy of the summons in chambers. If the decision is i followed then the affidavit in reply of the plaintiff was filed within time as it was filed within the 14 days of the service of the sealed copy.

The *PNISB* case was decided about two months after the *Structural Concrete* case was decided by a different panel of the Court of Appeal and the *Structural Concrete* case was obviously not brought to the attention of the later panel of the Court of Appeal. The Court of Appeal in the *Structural Concrete* case had in fact examined the High Court decision in the *PNISB* case and disagreed with the decision and stated, reluctantly and with regret I believe, in regard to O. 32 r. 13(2) of the RHC (the equipollent provision of O. 24 r. 4(2) of the SCR) at p. 305:

> However, we would like to add that the critical words in O. 32 r. 13(2) for the purpose of computation are, "within 14 days from the date of the **filing** of the application;"
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> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed.

With respect, if the Court of Appeal in the *PNISB* case, following the best traditions of judicial thinking and compelling philosophy and syllogism for its decision, had been made aware of the Court of Appeal decision in the *Structural Concrete* case, I think, the *PNISB* case would have been decided differently; it is a matter of the express language of written law that overrides other considerations, however compelling, that must prevail.

The date of the **filing** in court of the application which the affidavit is intended to support has been made statutorily pivotal for the purpose of reckoning the validity period of the service on the opposite party and it follows that the defendant's objection to the plaintiff's affidavit in reply for being filed out of time was validly taken in the Sessions Court.

The defendant did file an affidavit in reply. Did he take a step in the proceedings and waive the non-compliance of O. 24 r. 4(2)? I think not; the deponent of the affidavit filed by the defendant did state that he was making the affidavit without prejudice to the preliminary objection made earlier to the court.

Appeal is dismissed with costs.